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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

NELL HUNTER, *et al.* individually and on behalf of all other members of the Board of Registrars in the State of Alabama,

*Appellants,*

VS.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,

*Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF FOR *AMICI CURIAE* NAACP AND AMERICAN JEWISH COMMITTEE IN SUPPORT OF AFFIRMANCE

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND AMERICAN JEWISH COMMITTEE *AMICI CURIAE*

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### Interest of the *Amici*

The NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (hereinafter "NAACP"), the nation's oldest and largest civil rights organization, directly represents the interests of hundreds of thousands of Black American members. The association was formed in the first decade of this century to advocate the political, legal and economic rights of Black Americans.

The NAACP has served, through the Special Contribution Fund, as counsel for plaintiffs in numerous voting

rights cases including, most recently, challenges to allegedly discriminato y reapportionment schemes in South Carolina, Florida, Indiana and Yonkers, New York. The NAACP has shown through both legal advocacy and legislative efforts a substantial and ongoing interest in the enforcement of the Voting Rights Act and the Fourteenth Amendment.

The American Jewish Committee (hereinafter "AJC"), founded in 1906, is likewise a national organization, concerned with the recognition and preservation of the constitutional rights of Jewish Americans, through the protection of the rights of all Americans. The AJC believes and advocates that the welfare of Jewish Americans is inseparably linked to the existence and extension of equal opportunity to all Americans and has consistently opposed impediments to the right to vote.

The Amici have fought consistently for equal protection of the law for all, regardless of race, color, creed or national origin, and have opposed racial discrimination, an obstacle to the fulfillment of such ideals. Amici are deeply concerned that such discrimination be prevented even where masked behind facially neutral statutory provisions, particularly where these have been deliberately framed for racially discriminatory purposes, as here.

Amici believe that affirmance by this Court in this case is necessary to vindicate and forward the purposes of the Fourteenth Amendment and the Voting Rights Act.

## Consent of the Parties

Counsel for appellees consent to the filing of this brief by Amici. Counsel for appellants refused to consent to the filing of this brief. Accordingly, Amici file herewith a Motion for Leave to File Amici Curiae Brief.

## Statement of Interest

The NAACP, as the nation's premier champion of the rights of Black Americans, and the AJC, a leading proponent of equal protection for all, each representing its numerous branches and chapters throughout the United States, feel compelled to file this Brief. The Eleventh Circuit has ruled that Alabama, by a facially neutral provision of its State Constitution, intended to exclude Black Americans on the basis of their race from the exercise of the voting franchise. Alabama now defends its constitutional provision by reference to an equally impermissible purpose: the desire to exclude poor whites from voting. This Court should affirm the Eleventh Circuit, clearly demonstrating that racial discrimination or class discrimination are impermissible purposes in State regulation of the electoral process.

While Amici recognize that the instant case may not directly impact thousands of persons, both believe that the principle involved—the impermissibility of state action to disenfranchise black Americans or poor whites because of fear as to how either group might vote—is of critical importance.

## Statement of the Case

We adopt the statement of the case presented by appellees, Underwood, et al.

## Summary of Argument

Alabama concedes that section 182 was enacted with a discriminatory purpose: to disenfranchise blacks and "poor whites." Alabama contends that the Court of Appeals improperly held that the State violated the Fourteenth Amendment. Alabama is wrong. The Court of Appeals properly concluded that the challenged constitutional pro-

vision was enacted for racially discriminatory purposes. On this basi alone, the Court of Appeals decision should be upheld.

That the State may have *in addition* sought to disenfranchise poor whites, even if true, does not save section 182 for the record clearly demonstrates that section 182 would not have been enacted absent the racially discriminatory motivation. In any event, enactment of the provision for the purpose of disenfranchising poor whites would invalidate section 182 as that purpose as well is unconstitutional, impermissible and illicit.

Prior decisions of this court have clearly held that fencing out a political group from the electoral process violates the equal protection clause. Alabama admits that this was the explicit intent of its framers. Accordingly, the Eleventh Circuit decision must be affirmed.

Contrary to the miscitations in appellants' brief, the Tenth Amendment does not give states *carte blanche* authority to violate the equal protection clause in the regulation of state or local elections. Likewise, section 2 of the Fourteenth Amendment does not expressly or by indirection support the authority of a State to deny the franchise to misdemeanants, particularly where such action was concededly motivated primarily by a desire to exclude racial and political groups from the political process and not by the desire to proclaim a state policy against voting by persons convicted of crimes of moral turpitude. The Eleventh Circuit correctly found that this latter justification did not inform the challenged constitutional section. Rather, it is a *post hoc* rationalization for action taken specifically and intentionally, as Alabama concedes, to disenfranchise racial and political elements judged to be a threat to the prevailing majority.

## ARGUMENT

### I.

### The Court of Appeals Properly Concluded That the Challenged Constitutional Provision Was Enacted for Discriminatory Purposes and the Appellants Concede as Much.

This appeal follows a decision by the Court of Appeals for the Eleventh Circuit reversing a district court opinion which had found that the Alabama constitutional provision in question—section 182 of the 1901 Constitution—was not adopted for racially discriminatory purposes. The Court of Appeals held that ample record evidence supported appellees' claim that the 1901 Constitutional Convention enacted the challenged provision as one component of a broader legislative scheme meant to disenfranchise blacks. (A-8-12). While not the only element of this scheme, the Court of Appeals found that the challenged enactment was intended to and has played a substantial role in ensuring that blacks, otherwise qualified, do not effectively participate in the political process.

Appellants only weakly challenge this specific conclusion of the Court of Appeals. On pages 11-12 of its Brief, Alabama rather confusedly addresses the issue of whether racial motivation informed the passage of the challenged provision. Admitting, as it must, that racial animus was expressed at the State Constitutional Convention (A-6-9), Alabama submits that this theme—"to disenfranchise blacks and not to disenfranchise any whites" [1]—should not "mislead" the courts into holding that racial animus, in fact, motivated the passage of the provision. However, Alabama's argument is entirely inconsistent and unpersuasive.

Alabama suggests that the racial animus was a "public relations ploy" intended to inflame whites into voting for

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[1] This is Alabama's summary of the history of the Constitutional convention on this issue.

the challenged provision, all the while believing they were simply disenfranchising blacks. Whites did so, Alabama now argues, without realizing that the true effect of the provision in question would disenfranchise them as well. This is certainly no argument against the Court of Appeal's conclusion that racial animus informed the passage of section 182. In fact, the State concedes as much.

On page 12 of its Brief, Alabama argues that a permissible purpose supported the passage of section 182. The purpose was to disenfranchise poor whites. However, Alabama's argument is circular. This purpose, if known, would have led to the defeat of the proposition. This provision would not have been enacted had this purpose been publicized or accepted. Indeed, Alabama concedes that this purpose was purposely concealed and whites led to believe that excluding blacks would be achieved by the provision. How Alabama can then argue that in the absence of the racially discriminatory purpose the provision would have been passed is more than mystifying. That purpose, by Alabama's own logic, was used precisely as a means of garnering public support for section 182. Accordingly, it is entirely fatuous to argue, as Alabama now does, that "this provision would have passed and the same result achieved regardless of any allegation concerning illicit motive or protected conduct." (Brief, p. 12). This assertion is fiction, for as the State previously concedes, racism was directly and intentionally used to inflame poor whites to vote for the provision. Had these same voters known that the real purpose of the provision was to disenfranchise *them* for political reasons, Alabama's current suggestion, they would have disfavored the provision, leading to its demise.

Nor has Alabama contested the proof of disparate impact upon which appellees have relief.

In light of the proof that Alabama was motivated at least in substantial part by a racially discriminatory pur-

pose and that section 182 has had a racially disparate effect upon blacks, the Court of Appeals properly shifted to Alabama the burden of showing that the provision was enacted to serve a substantial and legitimate state interest. Appellants, in response, contend that the challenged ordinance furthers a permissible state interest—disqualification of persons convicted of committing crimes of moral turpitude from electoral affairs.

However, in support of this argument, Alabama cites no excerpt from the 1901 Constitutional Convention which shows that the disqualification of those convicted of crimes manifesting moral turpitude was *actually* a legislative goal. A-12, *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 641, n. 9, *See*, Tribe, *American Constitutional Law*, pp. 594-598; 602; 1082-1088. In rejecting this argument, the Eleventh Circuit found that Alabama enacted the challenged provision to exclude blacks from the political process through a package of techniques which Constitutional Convention delegates believed would effectuate this goal. The delegates did not seek to declare as state policy that those convicted of crimes of moral turpitude could no longer vote. Had the latter purpose informed the Constitutional Convention, the Court of Appeals reasoned, the list of offenses conviction of which would trigger disenfranchisement would have been more inclusive. *Village of Arlington Heights* v. *M.H.D.C.*, 429 U.S. 252, 270, n. 21 (1976). As the Court of Appeals held, the means employed in a case alleging restrictions on the voting franchise must be precisely drawn to accomplish compelling purposes. *Kramer* v. *Union Free School District*, 395 U.S. 631 (1969). Finally, the State does not contest the Circuit Court's finding that the list of offenses conviction of which triggered disenfranchisement was tailored to include those offenses for which blacks were disproportionately convicted. Again, the Eleventh Circuit found, as a matter of fact, that this tailoring process was calculated to ensure the maximum exclusionary impact possible upon prospective black voters. A-10-11.

This court has long since settled upon an approach to the Fourteenth Amendment appropriate for this case. The Court of Appeals correctly applied this approach. First, following settled principles, it recognized that voting is a fundamental right and interest of citizenship. *Reynolds* v. *Sims,* 377 U.S. 533 (1964). Second, it found, correctly, that the challenged provision infringes upon the right to vote, indeed, by its terms, deprives certain persons of that right. Third, it found that this infringement was intended to and did adversely and disproportionately deprive blacks of the franchise. (A-13-14). These propositions fully support the Court of Appeals' conclusion that, unless Alabama could show (a) that a compelling state interest motivated the passage of the provision and (b) that this interest almost certainly would have led to the passage of the provision absent racially discriminatory motivation and racially disproportionate effect, *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1972), its enactment was unconstitutional.

The Eleventh Circuit next examined the reasons profferred at trial by the State for the enactment of section 182. The court found that Alabama itself had not characterized any of these reasons as "compelling" and had failed to show that any were so considered in 1901. Finally, the court found that since the provision was part of a broader effort to disenfranchise blacks, it would not have been adopted absent this discriminatory intent or if it was believed not likely to have such an effect.

In short, applying the proper Fourteenth Amendment analysis, the Court of Appeals found the provision racially discriminatory in intent and effect and lacking any compelling basis, either in 1901, the time of enactment, or in 1984. In this context, the Court of Appeals did not reach the issue of whether, in the presence of a compelling interest, the Constitutional Convention chose the least restrictive means, most respecting the importance of the right at stake. *Kramer, supra.*

## II.

## The Court Should Reject the Arguments Advanced by Alabama in Defense of Section 182.

Alabama urges this Court to reverse the decision of the Eleventh Circuit. In support of this plea, it makes three unconvincing and ill-grounded arguments. First, it maintains that the Tenth Amendment insulates the States from federal court challenges to locally established terms and conditions for the exercise of the franchise. Second, citing *Richardson* v. *Ramirez,* 418 U.S. 24 (1974), appellants assert an absolute and constitutionally-recognized right to prohibit misdemeanants from voting. Third, Alabama argues that a permissible purpose—the desire to disenfranchise poor whites—motivated enactment of the challenged provision and that, with this motive, the Constitutional Convention would have enacted section 182 absent its racial motivation and effect.

For the reasons explained below, none of these arguments is sound and the decision below should be affirmed.

### A. *The Tenth Amendment Does Not Give States Authority to Burden the Right to Vote in a Racially Discriminatory Manner.*

Alabama cites several cases for the proposition that the Tenth Amendment delegates to States the authority to establish the terms and conditions for participation in state and local elections. However, Alabama chooses to ignore the fact that this Court has clearly recognized that the Civil War Amendments limit the States' authority to regulate electoral participation. Accordingly, where the taint of racial discrimination is shown to have motivated state regulation of the franchise, this Court has strictly scrutinized the challenged provision. Contrary to Alabama's rather bold assertion that the "United States Constitution leaves unequivocally to the States the right to administer

the electoral process and to set qualifications and conditions upon the exercise of the franchise", in each case Alabama cites, this Court has articulated the clear limits of this state authority.

For instance, in *Kusper* v. *Pontikes,* 414 U.S. 51 (1973), cited by Alabama to support its claim that the Constitution unequivocally grants authority over local election regulation to the States, this Court affirmed a three-judge court's judgment that an Illinois statute requiring a twenty-three month period between a voter's participation in the primaries of the two major political parties was an unconstitutional abridgment of the right to associate. Relying upon *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), the Court held that states may not infringe upon basic constitutional rights in governing access to the political process. Contravening this basic principle, Illinois' enactment created a substantial restraint upon the voter's right to associate with a political party of his choice and to influence the affairs of that party. This was impermissible notwithstanding the Tenth Amendment's grant to the States of authority to regulate local elections.

*Kusper* is a particularly strong example of this Court recognizing the primacy of federally-protected rights over the Tenth Amendment interests of states because this Court recognized as legitimate the state interest Illinois sought to advance by its challenged enactment: limiting one political party's ability to "raid" the other party. Notwithstanding this "legitimate" interest, the Court found the state enactment unconstitutional: the state interest was insufficient in importance to justify the significant encroachment which the challenged statute worked upon associational freedom, a right recognized by the First Amendment. *Bates* v. *Little Rock,* 361 U.S. 516, 524 (1960).[2]

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[2] The instant case presents no "legitimate", let alone compelling, state interest. While *Kusper* arguably required this Court to bal-

*(footnote continued on following page)*

*Kusper* contradicts, rather than supports, appellants' assertion that States have an unequivocal right to supervise and control their elections.

Alabama next cites *Lassiter* v. *Northampton Board of Elections*, 360 U.S. 45 (1959) for this Court's allegedly "sweeping and persuasive comments concerning the power of a state to control their own elections." Again, *Lassiter* fails to support the proposition for which it is cited. In *Lassiter*, for a unanimous Court, Justice Douglas upheld North Carolina's literacy test as a facially neutral device by which the State judged voter suitability. Critically, the Court expressly limited its support of the literacy test to the issue of facial neutrality. As Justice Douglas noted, the Fifteenth Amendment would be violated by a state practice which gave whites preferential treatment at the polls, "But this issue of discrimination in the actual operation of the ballot laws of North Carolina has not been framed in the issues presented for the State court litigation . . . So we do not reach it." *Id.* at 50.

*Lassiter* clearly recognized the limits of the State's authority to regulate elections, "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . . absent of course the discrimination which the Constitution condemns." *Id.* Alabama fails to mention such limitations in its description of the States' regulatory authority, choosing, instead, to overstate the Tenth Amendment's primacy

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*(footnote continued from previous page)*

ance the legitimate interest forwarded by the challenged exercise of the State's Tenth Amendment regulatory authority, our case requires no such balancing for, as the Court of Appeals found, no legitimate, consistently forwarded, racially-neutral purpose is or has been advanced by Section 182.

*Kusper* also supports the appropriateness of the Fourteenth Amendment analysis elaborated in Part I of this Brief. Illinois failed, for instance, to show that the means it employed least restricted the constitutionally protected liberty. *Dunn* v. *Blumstein, supra.*

as against constitutional protections like the ones involved in the instant case. But, Justice Douglas clearly described the framework in which the States' authority may be exercised, " . . . while the right of suffrage is established and granted by the Constitution . . ., it is subject to the imposition of state standards *which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.*" *Id.* at 50-51 (emphasis added).

In deciding *Lassiter,* this Court was careful to distinguish the case before it from future cases which might (a) challenge as racially discriminatory the actual practice of a state which employed literacy tests or (b) allege that such tests were enacted to disenfranchise blacks. Specifically, Justice Douglas distinguished the facts in *Lassiter* from those in *Davis* v. *Schnell,* 81 F. Supp. 872, aff'd 336 U.S. 933, where a three-judge court held unconstitutional a literacy test which required citizens to "understand and explain" an article of the federal constitution. In that case, Justice Douglas wrote, "The legislative setting of that provision and the great discretion it vested in the registrars made clear that a literacy requirement was merely a device to make racial discrimination easy." *Lassiter, supra* at 53-54.

*Lassiter,* then, offers no support for a State like Alabama which is herein challenged for enacting with racial animus in its "legislative setting" a constitutional provision. To the contrary, *Lassiter* supports the appropriateness of federal judicial review in such instances to insure that the protections of the Fourteenth and Fifteenth Amendments are not trammelled by State provisions enacted with racial animus.

Finally, *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), provides no support, as Alabama claims, for the sweeping proposition that States have unbridled authority to regulate enfranchisement in state and local elections. In

*Oregon, supra,* while limiting Congress' authority to establish conditions for the exercise of the franchise in state, as opposed to federal elections, the Court again recognized that the Fourteenth and Fifteenth Amendments limit state authority in this area. *Id.* at 124-125. As Justice Black explained, "the framers of the Civil War Amendments intended[ed] to deny to the states the power to discriminate against persons on account of their race." *Id.* at 126.

Indeed, the very analysis which established the impermissibility of Congress' attempt to enfranchise 18 year olds in all (including state and local) elections underscores the limitations placed on the States (and the Tenth Amendment) by the Civil War Amendments. In declaring that Congress had overreached its constitutional authority, Justice Black expressly considered whether, in extending the franchise to 18 year olds in state and local elections, Congress had sought to rectify a racially-based inequity, i.e., were those persons aged 18-21 disenfranchised by the States due to their race and was Congress acting to rectify such discrimination? Justice Black answered those questions negatively:

> In enacting the 18 year old vote provision . . ., Congress made no legislative findings that the 21 year old vote requirement was used by the States to disenfranchise voters on account of race. I seriously doubt that such a finding, if made, could be supported by substantial evidence. *Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil Rights Amendments' ban on racial discrimination, I would hold that Congress has exceeded its power in attempting to lower the voting age in state and local elections . . .*

*Id.* at 130 (emphasis added).

Again, *Oregon* v. *Mitchell, supra,* particularly the language cited, supports appellees' position that the Fourteenth and Fifteenth Amendments limit the States' au-

thority to condition the exercise of the franchise. And, the cases make equally clear that enactments which intentionally disenfranchise or have that effect upon black voters are constitutionally infirm.

In short, this Court should reject Alabama's first argument: the States, as this Court has consistently held, do not have unbridled and unequivocal authority to condition the electoral franchise in state and local elections. The Civil War Amendments limit this authority. And, in the instant case, the appropriate application of settled Fourteenth Amendment analysis led the Court of Appeals to rule section 182 unconstitutional. The decisions cited by Alabama clearly recognize the limitations on State power and authority. And, instructively for *Hunter,* each draws such limits directly from the Civil Rights Amendments, upon which the Court of Appeals relied below.

**B. *Section 2 of the Fourteenth Amendment Does Not Expressly or by Indirection Support the State's Authority to Deny the Franchise to Misdemeanants, Particularly Where Such Action Was Motivated Primarily by Racial Animus and Not by the Desire to Proclaim State Policy Against Crimes of Moral Turpitude.***

As Justice Marshall predicted in his dissent in *Richardson* v. *Ramirez,* 418 U.S. 24, 83 (1974), Alabama next argues that that case supports a state's denial of the ballot to persons convicted of selected misdemeanors. In support of this contention, Alabama misstates the precedent and takes out of context the arguments made in Congress in support of section 2 of the Fourteenth Amendment. Indeed, as is demonstrated below, those supporting Section 2 were deeply committed to insuring that States readmitted to the Union *not* discriminate against blacks in the arena of voting, a commitment precisely contrary to Alabama's position here.

In *Richardson, supra,* this Court overturned a decision by the California Supreme Court which had declared un-

constitutional under the federal equal protection clause a state statute prohibiting felons from ever again voting. In *Richardson*, respondents had argued that no compelling state interest supported California's denial of the right to vote to felons who had served their debt to society and now sought to re-enter it. *Id.* at 27. In response, this Court reviewed the history of Section 2 of the Fourteenth Amendment which, California urged, expressly permitted states to disenfranchise those convicted of felonies. For the Court, Justice Rehnquist agreed with California, finding that Section 2 meant exactly what it said, allowing the very prohibition declared unconstitutional by the California Supreme Court.

Alabama cites *Richardson* as support for its state constitutional provision which disenfranchises misdemeanants. But a careful review of the same legislative history cited by Justice Rehnquist demonstrates that Congress intended to permit states to disenfranchise felons, not misdemeanants. And, *Richardson* turns on this specific legislative history, not upon some broader grant of authority to the States.

First, as this Court held in *Richardson*, section 2 applies only to *felonies*. In interpreting the meaning of the term "crimes," as used in Section 2, Justice Rehnquist cited the comments of Representative Ephraim Eckley (Ohio) who referred in his elaboration of "crimes" *only to felonies*. *Id.* at 46. Justice Rehnquist also notes in support of the conclusion that Section 2 allowed states to continue to disenfranchise felons evidence that 29 states did so in 1866, the year the Fourteenth Amendment was enacted. *Id.* at 47. The Court also observed that many of the Re-admission Acts, which set conditions on rebel states re-joining the Union, required States to prohibit from voting those who had participated in the rebellion (the Civil War) and those who had been convicted of *felonies* at common law. *Id.* at 48-49. This legislative history does *not* support Alabama's argument that Section 2 of the Fourteenth Amendment contemplates or approves of the state practice of prohibiting misdemeanants from voting.

Other parts of the legislative history show, even more strongly, that allowing Section 2 to protect a Constitutional provision passed with the expressed intent to discriminate against black voters would turn that section and the related Re-Admission statutes on their heads. For instance, Senator Henderson (Missouri), also cited by Justice Rehnquist in *Richardson*, made clear that to be readmitted to the Union, rebel states had to adopt universal suffrage "except for treasons of such crimes as were felonies at the common law, the regulation of exclusion to be left to the States themselves." *Id.* at 49.

Arkansas was re-admitted to the Union on June 22, 1868 under the terms of a State which required universal sufferage, but allowed exclusion for those who had committed "felonies at common law, where they (those excluded) should have been duly convicted, *under laws equally applicable to all the inhabitants of the state.*" Id. at 51 (emphasis added). Such language was included in Re-Admission statutes specifically to insure that Blacks were given equal access to the franchise as whites, not abused or denied the right to vote in former rebel states. *Id.* at 52. *See,* Comments of Senator Drake of Missouri, *Cong. Globe,* 40th Cong., 2d Session 2600 (1868).

As this recitation shows, Section 2 of the Fourteenth Amendment was not meant as a vehicle for allowing states to enact racially discriminatory restrictions on the electoral participation of blacks. Any state statute enacted pursuant to Section 2 had to treat all persons equally, regardless of race, and, by definition, any provision, such as Section 182, passed with the intent to discriminate against blacks, fails this standard.

Moreover, at the time it enacted Section 2, Congress was aware that States might attempt to selectively extend or deny altogether the franchise to Negroes. The legislative history cited in *Richardson* shows (a) that Congress readmitted rebel states with the understanding that they

would not allow rebels or persons convicted of felonies to vote but (b) that Congress was also concerned that, in defining felonies conviction of which would trigger disenfranchisement, states not use standards or tests which discriminate against blacks, denying them the right to suffrage.

As Justice Rehnquist held in *Richardson,* ". . . we may rest on the demonstrably sound proposition that section 2, in dealing with voting rights as it does, could not have meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which section 2 imposed for other forms of disenfranchisement." *Id.* at 55. The arguments adduced in support of this holding are unavailable in support of section 182 which denies the franchise to those convicted of certain, select misdemeanors, chosen, as the Court of Appeals found below, because of their disproportionate incidence among blacks, not because of the inherent qualities of persons associated with these misdemeanors, as opposed to others convicted of misdemeanors for which disenfranchisement did not follow.

Alabama argues that, regardless of its intent, it had authority under Section 2 to disenfranchise misdemeanants. It suggests that even if it selectively disenfranchised misdemeanants, using race as the basis for inclusion of one and exclusion of others, this would be permissible. Section 2 of the Fourteenth Amendment does not so tolerate and *Richardson* cannot be so stretched.

### C. *Disenfranchising Poor Whites Is Not a Permissible Basis for Upholding Section 182.*

The Court of Appeals found that Alabama had articulated no permissible basis in support of the adoption of section 182. A state, it reasoned, may not years later invent a justification for an enactment. Instead, the State must adduce evidence of the contemporary (1901) articulation of and reliance upon such an allegedly race-neutral purpose to rebut proof that same was enacted for dis-

criminatory purposes. *Cleveland Board of Education* v. *La Fleur, supra.*

In this instance, Alabama has failed to show that any permissible, let alone compelling, basis prompted the enactment of the challenged constitutional provision. In response to the State's argument that it passed section 182 to deny those convicted of violating the law of the franchise, the Court of Appeals responded, "we are unable to discern any evidence that the rule was actually intended to serve that interest." (A-12).

In rejecting the State's argument, the Circuit Court noted (a) there were several "glaring omissions" from the non-prison offenses resulting in disenfranchisement under Section 182; (b) such omissions call into question whether the "good government" purpose cited by appellants was an afterthought or a motivating principle and (c) the Constitutional Convention proceedings are bereft of any reference to or evidence of a "good government" purpose. The Court of Appeals concluded that the appellants had presented "no evidence" from which the district court could find that Section 182 would have been adopted had a permissible purpose motivated the enactment. (A-13).

The State now asserts that it had a compelling interest in disenfranchising those who had been convicted of misdemeanors involving moral turpitude, regardless of the length of punishment for the commission of said crimes. But, this argument fails because Alabama has still not shown that this purpose in fact motivated the delegates to the 1901 Constitutional convention. Instead, the record evidence supports the Court of Appeals' conclusion that racial discrimination, not the desire to punish those guilty of moral turpitude, motivated the convention. Nor has Alabama suggested the principle of selection which led its authorities to consider certain crimes as exhibiting moral turpitude and others, seemingly similar in seriousness, as not. In the absence of any alternative explana-

tion by appellants, the Eleventh Circuit concluded that the operative principle of selection was the delegates' observation of the incidence by race of the various offenses. This is clearly not a permissible basis for determining who can vote!

Offering no counter-evidence with regard to the principle of selection used to select those misdemeanors conviction of which would trigger disenfranchisement, Alabama instead cites *Kronlund* v. *Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971) for the permissibility of a state statute disqualifying felons from voting. But this case does not further Alabama's argument. *Kronlund* did not address the issues of (a) the selective disenfranchisement of persons on account of race; (b) the intentional enactment of a provision to disenfranchise based on race or (c) the permissibility of a state provision which, while facially neutral, has disproportionately exclusionary impact on blacks. Indeed, *Kronlund* decided no race-related issues at all, merely upholding Georgia's capacity to disallow felons from voting. The language cited by appellants from *Kronland* is dicta, having nothing to do, in any event, with the facts of the instant case.

Finally, Alabama suggests that Section 182 was passed for political reasons, to disenfranchise poor whites and blacks. Accordingly, the State asserts that the provision would have been enacted absent discriminatory intent. This argument fails both as unsupported below and as an admission by the State of yet another unconstitutional purpose.

First, the purpose of disenfranchising poor whites, even if present, is certainly not compelling. Such a reason, even if true, cannot save an enactment admittedly passed as well specifically to exclude blacks from voting. Conceding that discrimination against blacks as blacks was present, the State must adduce a non-racial, neutral, governmentally-appropriate basis for the challenged provision, not admit

to another illicit, unconstitutional purpose, such as class-based or politically motivated discrimination.[3]

Second, the political basis for the provision's enactment is inseparably linked to racial discrimination, not the sort of independent neutral reason which might justify a carefully-tailored restriction of a fundamental right. As the Eleventh Circuit concluded, the legislature wanted to disenfranchise blacks because of their assumed political loyalties, an obvious infringement not only upon the right to vote, but the First Amendment as well. Such a reason is hardly neutral or non-racial.

## CONCLUSION

In conclusion, the Eleventh Circuit properly analyzed the facts and controlling law in this case and its decision should be affirmed.

Respectfully submitted,

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[3] *Richardson* v. *Ramirez*, *supra*, at 82 (Marshall dissenting); *Carrington* v. *Rash*, 380 U.S. 89, 94 ("'Fencing out' from the franchise a sector of the vote population because of the way they may vote is constitutionally impermissible. 'The exercise of rights so vital to the maintenance of democratic institutions,' *Schneider* v. *Stark*, 308 U.S. 147 (1939) cannot constitutionally be obliterated because of a fear of the political view of a particular group of *bona fide* residents.") Alabama admits to this unconstitutional, content-based deprivation of the rights of "poor whites" to vote. This is patently unconstitutional. *Also see*, *Karcher* v. *Daggett*, 103 S. Ct. 2653 (1983); *Daggett* v. *Kimmelman*, 580 F. Supp. 1259 (D. N.J. 1984).